to authorize Buyer to operate the foregoing vessels on said Trade Route No. 27.

(b) Nor shall this Contract be effective unless any approval of the Federal Maritime Commission required by Section 15 of the Shipping Act, 1916, to make it lawful shall have been obtained in writing.

(c) Nor shall this Contract be effective until:

(i) The Maritime Administration grants its written consent to the delegation to Buyer of Seller's obligations under First Mortgage and the 3⅛% Promissory Note secured thereby, to the substitution of Buyer for Seller as the Mortgagor in such First Mortgage and as the Promisor in such Promissory Note, and to the release of Seller from all obligations thereunder, and

(ii) Crocker-Citizens National Bank (formerly Crocker-Anglo National Bank), Trustee, and Maritime Administration grant written consent to the delegation to Buyer of Seller's obligations under Second Mortgage and the 3⅛% Insured Preferred Ship Mortgage Bond secured thereby, to the substitution of Buyer for Seller as the Mortgagor in such Second Mortgage and as the Obligor in such Insured Preferred Ship Mortgage Bond, and to the release of Seller from all obligations thereunder.

provided, however, that should the holder of the Second Mortgage referred to above require payment at an increased rate of interest or otherwise increase the cost of discharging the debt in question, Seller will reimburse to Buyer as incurred the amount of such increase, and, *provided*, further that should the holder of said Second Mortgage decline under any condition to give such written consent, or be willing to give such written consent under conditions which are not acceptable to Seller, or should Seller elect to prepay said Second Mortgage and the Bond it secures, then:

(1) Seller will satisfy said original Second Mortgage by discharging the debt secured thereby;

(2) Buyer will execute and deliver to Seller a new Bond and Second Mortgage for the amount of the balance of principal due at the time of such satisfaction,

which said new Bond and Second Mortgage shall incorporate the same terms and conditions (including interest rate) as would have governed had Buyer assumed the original Second Mortgage-Bond, excluding the provisions limiting recourse to the SS's MARIPOSA and MONTEREY; and

(3) the execution and delivery by Buyer of said new Bond and Second Mortgage in favor of Seller shall have the same effect for the purposes of this sub-paragraph (c) as though the holder of the original Second Mortgage and Note had given the consent hereinabove referred to.

(d) Nor shall this Contract be effective until the Maritime Subsidy Board and Bethlehem Steel Corporation give the consents necessary to assign the contracts listed in Part III, Paragraph 1(a).

6. (a) At the termination of the voyage of each vessel in progress at the closing date, referred to in Part IV, Paragraph 1(a), or such other voyage as may be mutually agreed upon, Seller shall drydock said vessel at San Francisco or such other United States Pacific Coast port as may be mutually agreed upon, for examination of the bottom and other underwater parts, if Buyer so requests. If the bottom or other underwater parts of the vessel are found damaged so as to affect the vessel's Certificate of Class, Seller shall make same good as necessary to maintain the vessel's Class without any outstanding recommendations.

(b) If Buyer so requests, the tailshaft shall be drawn for examination while the vessel is in drydock. The cost of drawing and replacing the tailshaft shall be borne by Buyer unless it is found that the tailshaft and related parts revealed thereby do not meet the requirements of the Classification Surveyor, in which latter event Seller shall bear such costs as well as the cost of performing such work as may be necessary to maintain the vessel's Class.

(c) If any underwater parts, including the tailshaft, shall require repairs or work to maintain the vessel's Class, or if examination of the SS SONOMA or SS VENTURA by Buyer is performed during the period that the vessel is in drydock for special survey No. 6, then the cost of putting the vessel into and taking her out of drydock,

drydock dues, Classification Society Survey fees, shipyards' costs for examination, and any othes expenses incident to the drydocking and examination shall be borne by the Seller; otherwise such costs shall be borne by the Buyer.

(d) Seller's responsibility for damage to the bottom or other underwater parts shall be limited to the repair of damage reported by the Classification Society's surveyor following the drydocking, except that to the extent the cost of repairing any damage not so reported is recoverable from Seller's underwriters, Seller shall use its best efforts to recover said amount and to the extent such recovery is not used by Seller to perform repairs of any damage not so reported, Seller shall promptly pay over to Buyer any amount so recovered.

7. On the completion of drydocking of each vessel and completion of all repairs or other work as required pursuant to Paragraph 6 above, Seller will give Buyer notice that the vessel is ready for delivery and within one day thereafter, unless Coast Guard or other government regulations prohibit such transfer of title, title to the vessel will be transferred at the Coast Guard District Office in port of delivery. At the time of such transfer and concurrent with the delivery of the vessel from Seller to Buyer, Seller will deliver to Buyer:

(a) A valid and sufficient Bill of Sale, transferring title to the vessel to Buyer free and clear of all liens and encumbrances except as otherwise herein provided and warranting title to said vessel.

(b) Evidence satisfactory to Buyer that the American Bureau of Shipping will issue to Buyer its Classification Certificate showing the vessel fully classed with no outstanding requirements or recommendations in respect to vessel's Class.

(c) Current Certificate of the United States Coast Guard of the vessel's home port, showing ownership of the vessel in Seller free and clear of all liens and encumbrances except as otherwise herein mentioned.

(d) Photostatic copy of current valid Inspection Certificate of the United States Coast Guard, without any citations, and a current valid Cargo Gear Certificate, annual and quadrennial.

(e) Copy of the permanent registry of the vessel or a receipt showing its delivery to the United States Coast Guard.

(f) All certificates, plans and drawings relating to the vessel in the possession of Seller.

(g) With respect to the SS MONTEREY and SS MARIPOSA:

(i) Executed counterpart of the document or documents to which written consent has been obtained pursuant to Paragraph 5(c)(i).

(ii) Executed counterpart of the document or documents to which written consent has been obtained pursuant to Paragraph 5(c)(ii) above unless a new Bond and Second Mortgage has been executed by Buyer in favor of Seller in accordance with the provisions of said Paragraph 5(c)(ii).

And Buyer will deliver to Seller:

(h) California Sales Tax Watercraft Exemption Certificate executed by Buyer.

(i) Check in payment for the bunker fuel oil purchased by Buyer pursuant to Paragraph 9 hereinafter.

8. Seller warrants that on delivery each vessel will be free from all liens, encumbrances, and debts of any kind whatsoever with the exception of the First Mortgage and Second Mortgage referred to hereinabove and the debts secured thereby, and Seller will indemnify Buyer against and hold Buyer wholly harmless from any loss, expense or liability, including without limitation attorneys' fees and legal expenses, reasonably incurred because of the assertion, whether successful or not, of any encumbrance, lien, debt or claim of whatsoever kind or nature existing or arising out of events occurring prior to delivery of the vessel. Without in any way limiting the generality of the foregoing, Seller agrees that in the event any vessel sold hereunder is seized or detained under legal process on account of any such encumbrance, lien, debt or claim, Seller will immediately arrange for the posting of a bond or take such other steps as are necessary to release the vessel without delay.

9. Buyer will purchase the bunker fuel oil aboard each

vessel at the time of delivery at Buyer's then current contract price at the port of delivery.

10. All models, pamphlets, printing blocks, plans, photographs of the vessels, publicity and promotional material, brochures, and other similar material relating to each vessel, whether in the possession of Seller or in the possession of advertising agents or others, shall be delivered to Buyer not later than the time of delivery of such vessel.

11. Seller and Buyer each for itself represents and warrants that it is a citizen of the United States within the meaning of Section 2 of the Shipping Act, 1916, as amended.

12. California Sales Tax, if any, shall be paid by Seller.

Part II

Transferred Employees, Shoreside Business of the Vessels and Shoreside Equipment

1. (a) Buyer will offer to employ as of the closing date of the Contract those employees of Seller and Matson Navigation Company named on a list to be furnished by Seller to Buyer prior to closing of the Contract who are working for Seller's freight and passenger services. Seller and Matson Navigation Company will transfer to Buyer on the date of closing of the Contract all employees named on such list who accept Buyer's offer of employment.

(b) Prior to closing of the Contract the transferred employees will perform work for voyages to be commenced after delivery to Buyer of the vessels named in Part I of this Contract which are for the account of Buyer. After closing of the Contract the transferred employees will perform work required to complete those voyages in progress on the date of closing of the Contract which are for Seller's account. Seller will absorb the cost of all such employees prior to the date of closing of the Contract. Buyer will absorb the cost of all transferred employees on and after the date of closing of the Contract.

(c) Seller will make appropriate arrangements for space in Seller's building and provide related office services at Buyer's expense for Seller's employees who are to be transferred to Buyer until such employees can be moved to Buyer's facilities.

2. (a)

(i) Seller shall reimburse Buyer for severance benefits, if any, actually paid to any employee who transfers to Buyer from Seller or Matson Navigation Company on the closing of this Contract if Buyer terminates the employment of any such employee on or before One Hundred Fifty (150) days for employees located in Australia or New Zealand or on or before One Hundred Twenty (120) days for all other employees from the date of closing of this Contract, because Buyer finds that his continued employment is not required by Buyer in connection with the vessels purchased from Seller; provided that Seller shall not be

liable for severance benefits paid in excess of the severance benefits that would have been paid to any such employee under the Matson Navigation Company severance policy in effect on the date of transfer of employment to Buyer, and further provided that after termination of employment by Buyer such employee does not continue to perform services in connection with the vessels purchased from Seller, while employed by an agent of Buyer.

(ii) For each shoreside administrative employee transferred from Seller or Matson Navigation Company to Buyer on the closing of this Contract who is thereafter actively employed by Buyer for more than One Hundred Fifty (150) days for employees located in Australia or New Zealand or more than One Hundred Twenty (120) days for all other employees, Buyer will recognize shoreside service accrued in Seller's and Matson Navigation Company's employ for the purpose of determining severance benefits; *provided*, however, that such transferred employee will not be entitled to severance benefits in excess of the severance benefits that would have been payable to such employee under Seller's and Matson Navigation Company's severance policy in effect on the date of his transfer to Buyer if such employee had remained in Seller's or Matson Navigation Company's employ until termination of employment by Buyer, unless such service with Buyer subsequent to transfer would require, under Buyer's then existing severance policy, a larger payment to be made in which event such larger amount will be paid.

(b) For all shoreside administrative employees transferred from Seller or Matson Navigation Company to Buyer on the closing of this Contract who are thereafter actively employed by Buyer for more than One Hundred Fifty (150) days for employees located in Australia or New Zealand or more than One Hundred Twenty (120) days for all other employees, Buyer will recognize shoreside service accrued in Seller's and Matson's employ toward Buyer's benefit plans for vacation accrual and travel privileges and discounts. Buyer will enroll such transferees in its plans for Group Life, Hospital/Medical, Dental and Disability Insurance. Buyer, and Seller for employees of

Seller and Matson, will arrange with their respective insurers to eliminate any time lag in transferring under the respective group plans, in order than such transferees may be covered with no waiting period. Employees of Seller and Matson who are not vested under the "Retirement Plan for Certain Employees of Matson Navigation Company and its Subsidiary Companies" at the time of transfer to Buyer and who remain in the employment of Buyer more than One Hundred Fifty (150) days shall become vested when they have met any of the vesting requirements of such plan by reason of continuous service with Seller and Buyer and, if so required by the Plan, have attained age 55, and when so vested will be entitled to benefits established in such Plan on the date of transfer to Buyer for the period of service with Seller. Employees of Matson Navigation Company who are not vested under the "Alexander & Baldwin, Inc. Multi-Employer Retirement Plan" at the time of transfer to Buyer and who remain in the employment of Buyer more than One Hundred Twenty (120) days shall become vested when they have Ten (10) years continuous service with Matson Navigation Company and Buyer or attain age 55 while employed by Buyer, and when so vested will be entitled to benefits established in such plans on the date of transfer to Buyer for the period of service with Matson Navigation Company. Buyer will recognize shoreside service with Seller and Matson Navigation Company as "Affiliated Service" under Buyer's retirement plan for employees transferred from Seller or Matson Navigation Company under this Contract, and such transferred employees will be entitled to benefits established under Buyer's retirement plan for the period of service with Buyer. Such transferred employees who are members of the Alexander & Baldwin, Inc. Employees Investment Fund are to be fully vested in their contingent and member accounts as of the time of transfer.

Long Service Leave will be administered as follows for Seller's employees in Australia:

(i) If the employee has less than Ten (10) years service and employment is terminated by Seller without transfer to Buyer, or Buyer terminates employment within One Hundred Fifty (150) days after transfer because continued employment is not required by Buyer for the business of the vessels named in

Part I, Seller will pay to the terminated employee an amount calculated under the Matson Navigation Company severance plan.

(ii) If the employee has Ten (10) or more years of service and employment is terminated by Seller without transfer to Buyer, or Buyer terminates employment within One Hundred Fifty (150) days after transfer because continued employment is not required by Buyer for the business of the vessels named in Part I, Seller will pay to the terminated employee an amount calculated under the Long Service Leave program in Australia.

(iii) If an employee is transferred from Seller to Buyer and Buyer retains the employee more than One Hundred Fifty (150) days after transfer, Seller will transfer money to Buyer in an amount equal to the current value of the vested and unvested credits of such employees under the Long Service Leave program in Australia.

3. With the consent (if necessary) of respective Lessors, Seller shall transfer and assign to Buyer all its rights and obligations under such of Seller's office leases in Sydney, Melbourne, or Auckland as Buyer may request within Thirty (30) days from closing, with such proration of all tenants' rents and charges under the leases as may be agreed upon by the parties.

4. (a) Effective on the transfer of title to each vessel, Seller shall assign and deliver to Buyer all moneys received on account of advance sales of tickets or advance freight bookings for voyages on each such vessel, and will also deliver to Buyer all accounts, records and writings memorializing the then status of inquiries, commitments, or bookings by passengers and shippers. Buyer will perform all contracts for which such moneys have been received or refund such moneys to those entitled thereto, and will indemnify and hold Seller harmless from and against all claims and expenses arising out of Buyer's failure to so perform.

(b) In consideration of expenses for Buyer's voyages which have been prepaid by Seller, the employees of Seller and Matson Navigation Company who are transferred to Buyer will continue to perform the type of services they

have performed as employees of Seller and Matson Navigation Company required for processing prior cargo claims, passenger ticket adjustments, protection and indemnity claims for passengers and crew, report to Seller for Seller's voyages and termination and closing of Seller's business in New Zealand and Australia which includes termination of leases, accounting, preparation of tax returns and closing out Seller's business interests in New Zealand and Australia.

5. Buyer agrees to purchase from Seller "as is, whereis" the shoreside property and equipment as located and identified on the attached Exhibit "D" (incorporated herein by this reference) for the sum of $20,000 (TWENTY THOUSAND DOLLARS). Sales tax, if any, shall be borne by Seller. Seller will deliver possession of the office equipment listed on Exhibit "D" to Buyer at the time of closing of the Contract. All other property and equipment listed on Exhibit "D" will be delivered by Seller to Buyer in an orderly manner so that the vessels named in Part I can be properly served, whether operated by Seller or Buyer.

6. Seller has furnished Buyer with copies of all General Agency Agreements, Freight Agency Agreements, Passenger Agency Agreements, Travel Subagency Agreements, leases of office equipment, trade-out agreements, stevedoring contracts, terminal contracts, contracts for watchmen and guarding services, and all other contracts incidental and pertaining to Seller's operation of the vessels to be purchased, or, if oral, a statement of the essential features thereof.

Seller will use its best efforts to arrange, by assignment, novation or otherwise, that, as of respective dates to be agreed upon, Buyer be substituted for Seller in the continued performance of such of said contracts as Buyer designates, and in such event the rights, liabilities, expenses and income incurred or accruing under such contracts shall be apportioned between the parties as the circumstances fairly require.

Part III

Contracts for New Container Vessels

1. (a) Subject to Paragraph 5(d), Part I, Seller transfers and assigns to Buyer, effective on the date provided in Part IV for the closing of this Contract, all rights of Seller existing at such date of closing in and under the following contracts:

"Contract for the Construction of One Containership, MA Design C7-S-88a" between the United States of America represented by the Secretary of Commerce acting through the Maritime Subsidy Board and The Oceanic Steamship Company and Bethlehem Steel Corporation, dated the 20th day of February, 1970, and designated No. MA/MSB-89.

"Construction-Differential Subsidy Contract" between the United States of America represented by the Secretary of Commerce acting by and through the Maritime Subsidy Board and The Oceanic Steamship Company, dated the 20th day of February, 1970, and designated No. MA/MSB-90.

"Contract for the Construction of One Containership MA Design, C7-S-88a" between the United States of America represented by the Secretary of Commerce acting by and through the Maritime Subsidy Board and The Oceanic Steamship Company and Bethlehem Steel Corporation, dated the 20th day of February, 1970, and designated No. MA/MSB-91.

"Construction-Differential Subsidy Contract" between the United States of America represented by the Secretary of Commerce acting by and through the Maritime Subsidy Board and The Oceanic Steamship Company, dated the 20th day of February, 1970, and designated No. MA/MSB-92.

and Buyer hereby assumes and agrees to perform all obligations of Seller thereunder remaining unperformed on the closing date provided in Paragraph 1, Part IV.

(b) In conjunction with the transfer of said contracts, Seller agrees to:

(i) grant to Buyer a license to use plans for the construction of ships of the C7-S-88a Design, including working plans and other design and engineering data, that have been furnished by Seller to Bethlehem Steel Corporation and the Maritime Subsidy Board pursuant to the provisions of the Contracts designated as Contract No. MA/MSB-89 and Contract No. MA/MSB-91;

(ii) transfer and deliver to Buyer all plans, specifications, blueprints, correspondence, memoranda, contracts and other writings, documents, files and data pertaining to the negotiations and execution of said contracts and the construction of the vessels thereunder.

2. Buyer shall pay to Seller, in the manner provided in Part IV of this Contract, an amount equal to the amount which has been paid by Seller to the builder under said contracts as of the closing date provided in Part IV, Paragraph 1 hereof.

3. Seller warrants that as of said closing date Seller shall not be in default in the performance of any of Seller's obligations under said contracts, and that on the date of the execution of this Contract there are no amendments thereto or modifications thereof except those heretofore delivered to or brought in writing to the attention of Buyer and such further amendment or modifications as shall hereafter be made with Buyer's approval.

4. Seller warrants that it has no information or knowledge of any basis for a claim for patent, trademark, or copyright infringement, or of any assertions stating or implying the existence of such a claim. Seller makes no warranty, express or implied, that the vessels are or will be delivered free of the claims of any person by way of patent, copyright, trademark infringement, or that the vessels are free from defects in design, materials or workmanship. Seller shall within a reasonable time, after the receipt of a written request from Buyer, but at the expense of Buyer, render all reasonable assistance in the defense of any claim or suit for infringement.

Part IV—Closing of Contract

1. (a) This Contract shall be closed in the Main Office of Crocker-Citizens National Bank (hereinafter "the Bank"), One Montgomery Street, San Francisco, California, within five (5) working days from the time all of the consents referred to in Part I, Paragraph 5 above have been obtained, provided, however, that if all of said consents have not been obtained by 5 P.M., PST, January 15, 1971, or such later date as both parties shall agree to, then either party may by written notice to the other declare this Contract null and void and of no effect.

(b) At the time of such closing, Seller shall deliver to Buyer:

(i) Certified copy of a resolution of the Board of Directors of Seller authorizing the execution of this Contract and its implementation by Seller;

(ii) The written consents required under Part I, Paragraph 5(a), (b), (c) and (d), other than the consent to amend Contract No. FMB-81;

(iii) The assignments by Seller to Buyer referred to in Part III, Paragraph 1 in the form shown in Exhibit "E" hereto;

(iv) License for Buyer to use the C7-S-88a ship construction design granted under the provisions of Part III, Paragraph 1, in the form shown in Exhibit "F" hereto;

(v) An affidavit that Seller is a citizen of the United States within the meaning of the Shipping Act, 1916, as amended;

(vi) Bill of Sale to property and equipment described in Part II, Paragraph 5.

(c) And concurrently therewith Buyer at said time and place shall deliver to Seller:

(i) A certified copy of a resolution of the Board of Directors of Buyer authorizing the execution of this Contract and its implementation by Buyer;

(ii) The written consent to amend Contract No. FMB-81 required under Part I, Paragraph 5(a);

(iii) An affidavit that Buyer is a citizen of the United States within the meaning of Section 2 of the Shipping Act, 1916, as amended;

(iv) Payment in immediately available funds in a manner satisfactory to the Bank of 29% of the aggregate of the amounts set forth in Part I, Paragraph 2; Part II, Paragraph 5; and Part III, Paragraph 2, rounded down to the nearest $100,000; less $300,000;

(v) A Promissory Note in the amount of the balance due under this Contract provision for the payment of which is not elsewhere made providing for payment of said balance in three approximately equal annual installments on the first three anniversaries of the closing date of this Contract, interest on the unpaid balance at the daily prime rate charged by the Bank of America plus 1%, and prepayment without penalty. The Promissory Note shall be in the form and will contain the terms and conditions shown in Exhibit "G" hereto;

(vi) In the event Seller shall prepay the Second Mortgage and the Bond pursuant to Part I, Paragraph 5(c), a new Bond and Second Mortgage, as provided in said Paragraph.

2. The following shall be events of default under the Promissory Note:

(a) Default by Buyer in the payment of interest or principal due pursuant to said Note when the same shall become due and payable;

(b) Default by Buyer in the payment of the obligations assumed by Buyer under the Contracts assigned to Buyer pursuant to Part III, Paragraph 1;

(c) Default by Buyer under the First Mortgage or the Second Mortgage referred to in Part I, Paragraph 5(c);

(d) Buyer shall be dissolved or adjudged a bankrupt or shall make a general assignment for the benefit of its creditors or shall lose its charter by forfeiture or otherwise, or a receiver or receivers of any kind whatsoever, whether

appointed or not in Admiralty, Bankruptcy, Common Law or equity proceedings, and whether temporary or permanent, shall be appointed for the Vessels or for the property of the Buyer; or a petition for the reorganization of, or other proceeding or action in reference to, the Buyer under any of the provisions of the Bankruptcy Act shall be filed by the Buyer, or such petition shall be filed by creditors and the same is approved by the Court; or if reorganization of the Buyer under said Act is approved by the Court, whether proposed by a creditor, a stockholder or any other person whomsoever.

3. If any event of default by Buyer under the Promissory Note delivered to Seller under Paragraph 1(v) of this Part shall not be cured by Buyer within thirty (30) days from written notice by Seller to Buyer, the obligations of Buyer under the Promissory Note shall thereupon become immediately due and payable.

Part V—General Conditions

1. The provisions of Part V of this Contract apply to the whole of the Contract.

2. Without limitation of the other remedies of either party, the obligations hereunder of the Seller and of the Buyer shall be subject to a decree for specific performance by any court having jurisdiction.

3. Buyer and Seller represent to each other that neither has to its knowledge so acted that any brokerage or finder's fee is due to anyone as a result of the purchase/sale which is the subject of this Contract.

4. This Contract shall be construed and interpreted in accordance with the laws of the State of California.

5. Buyer shall not assign or delegate its rights or obligations under this Contract without the written consent of Seller and any attempt to do so shall be void.

6. Following the dates for the transfer of title to the Vessels and other property herein agreed to be sold or transferred, Seller will, on request of Buyer, execute and deliver to Buyer such further instruments in writing and do such further acts as may be required to complete or evidence the transaction herein provided for and Buyer will, on request, execute and deliver like instruments to Seller and perform like acts.

7. Title to all of Seller's records, documents, and papers pertaining to the items sold hereunder shall remain in Seller but any thereof which Buyer may reasonably require for use in connection with the use of the items or pertaining to the business of the vessels sold or transferred hereunder after the dates for the closing of title to the items shall either be delivered to Buyer or made available to it in such manner as may best meet the respective needs of the parties. In any case, the party receiving or retaining such records shall make them available to the other during a period of five (5) years following the date of closing of title to the items to which they pertain, or such longer period as is required by the Maritime Administration or any other Government agency.

8. All notices required to be given under this Contract shall be given by personal delivery, telegraph or registered mail letter to the folling addresses:

BUYER: PACIFIC FAR EAST LINE, INC.
141 Battery Street
San Francisco, California 94111

SELLER: THE OCEANIC STEAMSHIP COMPANY
100 Mission Street
San Francisco, California 94105

or to such other address as shall be set forth in a written notice given by one party to the other party in the manner described in this Contract.

9. If conditions are imposed upon the consents to be obtained under this Contract that would materially alter the terms of this Contract, and the parties cannot agree to an amendment of this Contract that would reflect those conditions, either party has a right to terminate this Contract on prompt written notice to the other.

10. Except as provided in Paragraph 11 hereunder, this Contract is not intended to be divisible, and the performance by each party in every material respect of the obligations on its part to be performed in the sequence provided herein is a condition to the obligation of the other party to render the performance thereafter or concurrently to be performed on its part, without regard to the fact that this Contract is divided into separate Parts.

11. (a) In the event of the actual or constructive total loss of any vessel prior to delivery to Buyer, delivery of said vessel shall be excused and such loss shall be treated as a prepayment on the closing date against the Promissory Note referred to in Part IV, Paragraph 1(c)(v) of an amount equal to the purchase price of said vessel, provided, however, that in the event of the actual or constructive total loss of either the SS MARIPOSA or SS MONTEREY prior to the closing date referred to in Part IV, Paragraph I, Buyer may at its election, if exercised prior to said closing date, declare this entire Contract null and void.

(b) If, as to any vessel, delivery cannot be made to or accepted by Buyer within 110 days after the closing date of the Contract for any reason (other than total or constructive total loss) beyond the control of the party unable

to perform, Buyer may terminate this Contract with respect to such vessel by giving written notice within five days after the expiration of said 110 days whereupon the obligation of Seller to deliver such vessel shall be excused and such termination shall be treated as a prepayment against the Promissory Note referred to in Part IV, Paragraph 1(c)(v) of an amount equal to the purchase price of said vessel.

(c) If Seller determines that the cost of placing either the SS SONOMA or SS VENTURA in Class, with Special Survey No. 6 completed, free of outstanding recommendations by the American Bureau of Shipping and the United States Coast Guard, with all certificates described in Exhibit "C" valid, with all gear and equipment in good operating condition as required by Paragraph 1(e), Part I, and of performing deferred maintenance and repairs under Paragraph 3(b), Part I, and of performing Seller's obligations under Paragraph 6, Part I, would reduce the proceeds of the sale of the vessel to Buyer below the scrap value of the vessel, Seller may elect to sell the vessel to a third party for its scrap value, and if such vessel is sold by Seller for its scrap value and Seller so notifies Buyer in writing, Seller shall be relieved of Seller's obligation to sell and deliver the vessel to Buyer under this Contract.

12. (a) It is the intention of the parties that transfer of the vessels from Seller to Buyer shall occur with a minimum of interruption in their gainful employment and a minimum of unnecessary expense or loss to Seller and Buyer, and each party agrees that in performing this Contract, it will at all times use its best reasonable efforts to achieve this objective.

(b) If, consistent with the foregoing intention, a vessel on arrival at port of delivery has cargo or passengers aboard destined to a beyond port, Buyer will, if requested by Seller, and to the extent it can reasonably do so without contravening any statute or breaching its subsidy contract;

(i) As to cargo:

Carry the goods to such beyond port on payment of reasonable freight and charges pursuant to a non-negotiable receipt authorized by 46 USC 1306 issued to Seller which will contain same terms and conditions as are found in Buyer's regular form bill of lading but will provide that

the responsibility for such cargo loss and damage as cannot be allocated between the parties on the basis of existing evidence will be borne between them in the proportion that gross freight applicable to such cargo is earned by each, or shall make such other provision for disposing of cargo claims as the parties may agree upon. Cargo not so on carried by Buyer will be discharged by Seller prior to delivery of vessel to Buyer.

(ii) As to passengers:

Complete performance of Seller's ticket contracts on payment to it by Seller of an equitable portion of the fare, each party to indemnify and hold harmless the other against passenger claims recognized or adjudged to be the responsibility of the indemnifying party.

13. Each party agrees to cooperate with the other to obtain the consents required by Part I, Paragraph 5.

14. This Contract constitutes the entire agreement between the parties and may not be modified or terminated except in a writing executed by duly authorized representatives of Buyer and Seller.

15. This Contract shall inure to the benefit of and shall be binding upon the parties and upon their respective successors.

IN WITNESS WHEREOF the parties hereto have executed this Contract as of the day and year first above written.

THE OCEANIC STEAMSHIP COMPANY	PACIFIC FAR EAST LINE, INC.
By MALCOLM H. BLAISDELL *President*	By L. C. ROSS *President*
Attest: WILLIS R. DEMING *Secretary*	Attest: K. S. LYNCH *Secretary*

FEDERAL MARITIME COMMISSION
Agreement No. 9903
Filed 10/6/70
Approved _____

Matson Navigation Company guarantees the performance of Seller's obligations under the foregoing Contract of Sale.

MATSON NAVIGATION COMPANY

By MALCOLM H. BLAISDELL
President

Attest:

WILLIS R. DEMING
Secretary

EXHIBIT E

ASSIGNMENT

AGREEMENT made this ____ day of _____, 1970 between MATSON NAVIGATION COMPANY, hereinafter called the "Assignor," and PACIFIC FAR EAST LINE, INC., hereinafter called the "Assignee."

Pursuant to the Contract of Sale entered into between the parties dated this ____ day of _____, 1970, it is agreed:

1. For valuable consideration, receipt of which is hereby acknowledged, the Assignor hereby assigns to the Assignee all its interest in the contracts designated:

A. "Contract for the Construction of One Containership, MA Design C7-S-88a" between the United States of America represented by the Secretary of Commerce acting through the Maritime Subsidy Board and The Oceanic Steamship Company and Bethlehem Steel Corporation, dated the 20th day of February, 1970, and designated No. MA/MSB-89.

B. "Construction-Differential Subsidy Contract" between the United States of America represented by the Secretary of Commerce acting by and through the Maritime Subsidy Board and The Oceanic Steamship Company, dated the 20th day of February, 1970, and designated No. MA/MSB-90.

C. "Contract for the Construction of One Containership MA Design, C7-S-88a" between the United States of America represented by the Secretary of Commerce acting by and through the Maritime Subsidy Board and The Oceanic Steamship Company and Bethlehem Steel Corporation, dated the 20th day of February, 1970, and designated No. MA/MSB-91.

D. "Construction-Differential Subsidy Contract" between the United States of America represented by the Secretary of Commerce acting by and through the Maritime Subsidy Board and The Oceanic Steamship Company, dated the 20th day of February, 1970, and designated No. MA/MSB-92.

2. The Assignee hereby assumes and covenants to perform all the duties of the Assignor under the respective contracts and guarantees to hold the Assignor harmless from any claims or demand made thereunder.

IN WITNESS WHEREOF the parties have executed this Assignment, on this ____ day of _____, 1970.

THE OCEANIC STEAMSHIP COMPANY

By _____

Attest:

_____

PACIFIC FAR EAST LINE, INC.

By _____

Attest:

_____

EXHIBIT F

LICENSE

THE OCEANIC STEAMSHIP COMPANY, a California corporation, grants to PACIFIC FAR EAST LINE, INC., a Delaware corporation, the right, privilege and license to use (exclusively for the construction of vessels for the use of or sale by PACIFIC FAR EAST LINE, INC.) plans for the construction of ships C7-S-88a Design, including working plans and other design and engineering data, that have been furnished by THE OCEANIC STEAMSHIP COMPANY to Bethlehem Steel Corporation and the Maritime Subsidy Board pursuant to the provisions of a contract entitled "Contract for the Construction of One Container Ship, MA Design C7-S-88a" between the United States of America represented by the Secretary of Commerce acting through the Maritime Subsidy Board and THE OCEANIC STEAMSHIP COMPANY and Bethlehem Steel Corporation, dated the 20th day of February, 1970, designated by Contract No. MA/MSB-89, and a contract entitled, "Contract for the Construction of One Containership MA Design, C7-S-88a" between the United States of America represented by the Secretary of Commerce acting by and through the Maritime Subsidy Board and The Oceanic Steamship Company and Bethlehem Steel Corporation, dated the 20th day of February, 1970, designated No. MA/MSB-91.

This license is granted pursuant to the Contract of Sale between the parties dated this ____ day of _____, 1970.

IN WITNESS WHEREOF, THE OCEANIC STEAMSHIP COMPANY has caused this license to be signed and sealed by its duly authorized officers.

THE OCEANIC STEAMSHIP COMPANY
By _____

Dated _____

(SEAL)

EXHIBIT G

PROMISSORY NOTE

San Francisco, California _____, 197—

Pacific Far East Line, Inc., a Delaware corporation, maker, promises to pay to the order of The Oceanic Steamship Company, a California corporation, payee: $_____ and interest on the unpaid balance at the daily prime rate charged by the Bank of America plus 1% from _____ payable on this date annually in three equal installments. Delinquent interest shall be added to principal and become a part of it and bear interest at the same rate as principal.

Events of default under this Promissory Note shall be:

(a) Default by maker in the payment of interest or principal due pursuant to said Note when the same shall become due and payable;

(b) Default by maker in the payment of the obligations assumed by Buyer under the Contracts assigned to Buyer pursuant to Part III, Paragraph 1 of the Contract of Sale between Pacific Far East Line, Inc. and The Oceanic Steamship Company dated _____;

(c) Default by maker under the First Mortgage or the Second Mortgage referred to in Part I, Paragraph 5(c) of the Contract of Sale between Pacific Far East Line, Inc. and The Oceanic Steamship Company dated _____;

(d) Maker shall be dissolved or adjudged a bankrupt or shall make a general assignment for the benefit of its creditors or shall lose its charter by forfeiture or otherwise, or a receiver or receivers of any kind whatsoever, whether appointed or not in Admiralty, Bankruptcy, Common Law or equity proceedings, and whether temporary or permanent, shall be appointed for the vessels or for the property of the maker; or a petition for the reorganization of, or other proceeding or action

in reference to, the maker under any of the provisions of the Bankruptcy Act shall be filed by the maker, or such petition shall be filed by creditors and the same is approved by the Court; or if reorganization of the maker under said Act is approved by the Court, whether proposed by a creditor, a stockholder or any other person whomsoever.

If any event of default by maker under this Promissory Note delivered to payee shall not be cured by maker within Thirty (30) days from written notice by payee to maker, the obligations of maker under this Promissory Note shall thereupon become immediately due and payable. Failure to exercise this option at the occurrence of one or more of these events shall not prevent its exercise at the occurrence of any other events.

If any provision or any word, term, clause, or part of any provision of this Note shall be invalid for any reason, the same shall be ineffective, but the remainder of this Note and of the provision shall not be affected and shall remain in full force and effect.

The maker of this Note and every person who assumes the obligations of this Note (1) consents and agrees to be bound by and comply with all promises, covenants, agreements, and provisions of this Note, and promises absolutely and unconditionally to pay it when due, whether at maturity, by acceleration, or otherwise; (2) agrees to pay costs and attorneys' fees, as set forth below, and costs and reasonable attorney's fees incurred in the enforcement of the guaranty contained in this Note; (3) consents to all waivers contained in this Note; (4) waives presentment, demand, protest, notice of protest, notice of dishonor, notice of nonpayment, and notice of any kind with respect to this note or any guaranty of it or the performance of the obligations under this note or any guaranty of it; (5) waives the right, if any, to the benefit of, or to direct the application of, any security hypothecated to the holder until all indebtedness of the makers to the holders shall have been paid; (6) waives the right to require the holder to proceed against any other person or pursue any other remedy before proceeding against him, and except as otherwise required by law, waives the right to require the holder to proceed against any security before proceeding against him; and

(7) agrees that no renewal or extension of this Note, including a renewal or extension in which this Note is surrendered, no change of rate of interest, no release, surrender, or substitution of security for this Note, no modification of the terms of any security or other agreement relating to this Note, no release of or covenant not to sue or covenant not to levy execution against property of any person liable on this Note, including any maker, guarantor, or indorser, no delay in the enforcement of payment of this Note or any guaranty of it, and no delay or omission in exercising any right or power under this Note or any guaranty of it, shall affect his liability.

The maker of this Note and every person who assumes the obligations of this Note, agrees to pay the following costs, expenses, and attorney's fees paid or incurred by the holder of this Note, or adjudged by a Court: (1) reasonable costs of collection, costs and expenses, and attorney's fees paid or incurred in connection with the collection, enforcement, or sale of this Note or any part of it, or of any security for it, or of any covenant of this note or such security, whether or not suit is filed; (2) costs of suit and such sum as the Court may adjudge as attorney's fees in any action to enforce payment of this Note or any part of it; and (3) costs of suit and such sum as the Court may adjudge as attorney's fees in any other litigation or controversy connected with this Note, or security for it, including but not limited to actions for declaratory relief that any such holder is required to prosecute or defend and actions for relief based on rescission, or actions to cancel this Note that any such holder is required to defend.

This Note, and the rights and obligations of parties to it, shall be governed by, and construed and interpreted in all respects in accordance with, the laws of the State of California.

The maker of this Note and every person who in writing assumes the obligations of this Note, hereby waives all rights and benefits conferred by the statute of limitations in any action on this Note, or any security for this Note, to the extent permitted by Section 360.5 of the California Code of Civil Procedure.

IN WITNESS WHEREOF, Pacific Far East Line, Inc. has caused this Note to be signed and acknowledged by its President, and its corporate seal to be affixed. Executed and

delivered in San Francisco, State of California, on _____, 197__.

PACIFIC FAR EAST LINE, INC.

By _____
(*Signature of Officer*)

_____
(*Title of Officer*)

AND BY _____
(*Signature of Officer*)

_____
(*Title of Officer*)

FEDERAL MARITIME COMMISSION
Agreement No. 9903
Filed 10/6/70
Approved _____

Letter of Transmittal of Agreement No. 9903, to Francis C. Hurney, Secretary, Federal Maritime Commission [FMC], from Leo C. Ross, President, Pacific Far East Line, Inc., dated October 6, 1970; Supplement thereto:

PACIFIC FAR EAST LINE, INC.
918 SIXTEENTH STREET, N.W. WASHINGTON, D.C. 20006
(202) 783-7733

October 6, 1970

Mr. Francis C. Hurney
Secretary
Federal Maritime Commission
1405 Eye Street, N.W.
Washington, D.C. 20573

Dear Mr. Hurney: Subject: Contract of Sale between the Oceanic Steamship Company and Pacific Far East Line, Inc.

There are transmitted herewith three copies of the Contract of Sale dated October 1, 1970, between The Oceanic Steamship Company (Oceanic) and Pacific Far East Line, Inc. (PFEL) for the sale of four ships and for the assignment to PFEL of Oceanic's rights in two contracts with Bethlehem Steel Corporation for the construction of two containerships and in the associated Construction-Differential Subsidy contracts with the United States.

PFEL and Oceanic have been advised by their respective counsel that the Contract of Sale does not require approval of the Federal Maritime Commission under the provisions of Section 15 of the Shipping Act, 1916, or any other statute administered by your Commission. However, if the Commission is of a contrary view, please consider this an application for such approval.

For your information, the contract is being submitted to the Maritime Subsidy Board for the approvals and consents specified in Part I-5 of the Contract.

Respectfully yours,

/s/ Leo C. Ross
Leo C. Ross
President

Attachs.

PACIFIC FAR EAST LINE, INC.
918 SIXTEENTH STREET, N.W. WASHINGTON, D.C. 20006
(202) 783-7733

October 6, 1970

Mr. Francis C. Hurney
Secretary
Federal Maritime Commission
1405 Eye Street, N.W.
Washington, D.C. 20573

Dear Mr. Hurney: Subject: Contract of Sale between the Oceanic Steamship Company and Pacific Far East Line, Inc.

This will supplement my letter to you of this date, captioned as above.

The Contract of Sale between the Oceanic Steamship Company and Pacific Far East Line, Inc., previously transmitted, constitutes the entire transaction between the two companies; there are no supplementary or separate agreements between them.

We request expedited handling by your Commission because:

(1) The fact of this transaction has been public knowledge for some time and is adversely affecting the morale of the personnel of Oceanic. Despite our assurances that we intend to retain existing staff, there is an understandable feeling of uncertainty among Oceanic's personnel, especially among those best able to obtain other employment. We have already lost one key man in the Passenger Department.

(2) The passenger "season" in the Australian trade begins in November. The SS MARIPOSA is presently scheduled to sail November 3.

Respectfully submitted,

/s/ Leo C. Ross
Leo C. Ross
President

Protest, Request for Hearing and Petition to Intervene, Seatrain Lines, Inc., dated October 21, 1970:

BEFORE THE
FEDERAL MARITIME COMMISSION

In re: AGREEMENT 9903—BETWEEN PACIFIC FAR EAST LINE, INC. AND OCEANIC STEAMSHIP COMPANY (AND MATSON NAVIGATION COMPANY, GUARANTOR)	Docket No. 70-

PROTEST, REQUEST FOR HEARING, AND PETITION TO INTERVENE OF SEATRAIN LINES, INC.

Seatrain Lines, Inc. ("Seatrain") hereby protests the consummation of Agreement No. 9903 between Pacific Far East Line, Inc. ("PFEL"), Oceanic Steamship Company ("Oceanic"), and Matson Navigation Company ("Matson"), guarantor of performance for Oceanic, for the sale of vessels and related equipment filed with the Federal Maritime Commission ("Commission") and noticed in the *Federal Register* of October 14, 1970. Seatrain requests that a hearing be held pursuant to a Commission investigation into the anticompetitive and prejudicial consequences of this agreement. Seatrain further petitions that it be allowed to intervene in that proceeding for the purpose of demonstrating the prejudicial impact of the agreement on Seatrain's operations in the Pacific trades.

1. Seatrain is a common carrier in the Pacific Coast/Hawaii and Guam trades and is considering entry into the trades between the Pacific Coast and the Far East (T.R. 29) and South Pacific (T.R. 27) in the future.

2. Agreement No. 9903 provides for the sale of the entire Oceanic fleet to PFEL thereby eliminating Oceanic as a competitor in the Pacific trades. Included in Oceanic's fleet are two cargo ships acquired by that company under the Merchant Ship Sales Act of 1946, two combination passenger/cargo ships built with construction-differential subsidy ("CDS"), and two containerships now being built with CDS. Also included in the arrangement are various understandings between the parties concerning related equipment, effects on employees, terminal facilities, and

subsidy contracts awarded by the Maritime Administration/Maritime Subsidy Board ("Board"). Oceanic has requested approval of the Board to withdraw these ships from its subsidized service on T.R. 27; while on its part, PFEL has applied for similar operating-differential subsidy ("ODS") contracts on T.R. 27 and also proposes to interchange the acquired ships with its current fleet operating on T.R. 29 (*Federal Register*, September 16, 1970).

3. PFEL serves Guam from California with two converted C-4 containerships and two breakbulk ships which call at Hawaii for outbound cargo. PFEL has also applied to the Board for approval under section 805(a) of the Merchant Marine Act, 1936, for permission to serve Hawaii as part of its subsidized service on T.R. 29. The ships to be acquired by PFEL could be used in direct competition with Seatrain in the services between the Pacific Coast and Hawaii, between Hawaii and Guam, and between the Pacific Coast and Guam. Seatrain would be severely prejudiced by the operation of CDS-built ships in these domestic trades.

4. The sale of these vessels increases the size and the scope of operation of PFEL's fleet. The sale also negates the possibility of PFEL entering into T.R. 27 as a competitor of Oceanic or of Oceanic entering T.R. 29 as a competitor of PFEL. This consolidation of common carriers would be a violation of section 7 of the Clayton Act (15 U.S.C. § 18) if carried out without Commission approval under section 15 of the Shipping Act, 1916, as amended. Invasions of the antitrust laws must be justified by the parties to the anticompetitive agreement. *FMC v. Svenska Amerika Linien*, 390 U.S. 238 (1968). The resulting concentration of competition on these routes would constitute a formidable barrier to the entry of any prospective competitor such as Seatrain. The burden of demonstrating a counterbalancing transportation need rests heavily on PFEL and Oceanic.

5. Seatrain believes that Agreement No. 9903 is unjustly discriminatory and unfair as between carriers, will operate to the detriment of the commerce of the United States, and will be contrary to the public interest. Therefore, Seatrain asserts that the Agreement cannot and should not be approved by the Commission under section 15 of the Shipping Act, 1916, as amended.

WHEREFORE, Seatrain urges the Commission to commence an investigation concerning the impact of this Agreement and into the possibility of other mutual understandings or agreements not included within the scope of Agreement No. 9903. Seatrain requests that a hearing be ordered and that it be permitted to intervene and to fully participate in the proceeding. This would enable Seatrain to demonstrate that Agreement No. 9903 should not be approved.

Respectfully submitted,

By Marvin J. Coles
MARVIN J. COLES

By Paul M. Tschirhart
PAUL M. TSCHIRHART

COLES & GORETNER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for:
SEATRAIN LINES, INC.

October 21, 1970

[Certificate of Service Omitted in Printing]

Reply of Pacific Far East Line, Inc. to Seatrain Lines, Inc., dated October 23, 1970:

BEFORE THE
FEDERAL MARITIME COMMISSION

IN THE MATTER OF CONTRACT OF SALE BETWEEN THE OCEANIC STEAMSHIP COMPANY AND PACIFIC FAR EAST LINE, INC.
(AGREEMENT NO. 9903)

REPLY OF PACIFIC FAR EAST LINE, INC.

Pacific Far East Line, Inc. (PFEL) files its reply to the Protest, Request for Hearing, and Petition to Intervene filed by Seatrain Lines, Inc. (Seatrain). Seatrain has neither a legitimate interest in nor standing to protest against Agreement No. 9903 between PFEL and The Oceanic Steamship Company (Oceanic).

1. Agreement No. 9903 relates principally to ships heretofore operated and hereafter to be operated on Trade Route 27 (Pacific Coast/Australia-New Zealand). As to that trade, the fact that Seatrain may be "considering entry into the trade . . . in the future" means nothing.

2. Seatrain states (Paragraph 2) that Agreement No. 9903 would eliminate "Oceanic as a competitor in the Pacific trades." Oceanic has no U.S.-flag competition on Trade Route 27. Neither PFEL nor Seatrain now operates on any part of that trade.

3. Seatrain must be aware of the inaccuracy of the statements made in its Paragraph 3. PFEL serves Guam only with two containerships; it does not operate breakbulk ships in that trade. The containerships operate only between the Pacific Coast and Guam; they do not carry cargo from Hawaii to Guam. PFEL's application for approval under Section 805(a) of the Merchant Marine Act, 1936, was amended by letters dated September 4 and September 10, 1970, so as to request only the carriage of domestic passengers (including their baggage and accompanied automobiles) on combination passenger-cargo ships (1) between ports in California and ports in Hawaii; (2) between any

United States ports in connection with cruises; and (3) between ports in California on regularly scheduled voyages on Trade Route 27. This was plainly stated in the Notice published by the Administration/Board in the *Federal Register* (35 Fed. Reg. 15655), to which Notice Seatrain responded.

With respect to Guam, PFEL stated in its reply to Seatrain's protest filed in Docket No. S-256 on October 19, 1970, and served upon Seatrain as follows:

> "Nothing filed by Seatrain is addressed to issues under Section 605(c), with the possible exception of its statement that Guam may somehow be construed to be a part of Trade Route 27 because of the inclusion in the route description of 'ports of islands lying along the general route' of Trade Route 27. But in fact Guam is not on Trade Route 27; it has not been served by Oceanic Steamship Company heretofore and PFEL does not intend to serve Guam with ships operated on Trade Route 27. PFEL did not intend its application to permit service between the United States and Guam by ships operated with subsidy on Trade Route 27, and has no objection to a specific restriction to that effect if the Board believes it is necessary."

The facts stated in PFEL's reply are accurate. The conclusion stated by Seatrain that "The ships to be acquired by PFEL could be used in direct competition with Seatrain in the services between the Pacific Coast and Hawaii, between Hawaii and Guam, and between the Pacific Coast and Guam . . ." is inaccurate.

4. Paragraphs 4 and 5 of Seatrain's document are merely vague and conclusory assertions without any factual or legal support. The Commission's Notice (35 Fed. Reg. 16114) was ample warning notice that such tactics would not be permitted, for it stated:

> "Any person desiring a hearing on the proposed agreement shall provide a clear and concise statement of the matters upon which they desire to adduce evidence. An allegation of discrimination or unfairness shall be accompanied by a statement describing the discrimination or unfairness with particularity. If a violation of the Act or detriment to the commerce of the United States is alleged, the statement shall set forth with

particularity the acts and circumstances said to constitute such violation or detriment to commerce."

This has not been done by Seatrain.

PFEL, therefore, requests that Seatrain's protest be given no weight, that the petition for leave to intervene, and request for hearing be denied, and that Agreement No. 9903 be approved.

Respectfully submitted,

/s/ Odell Kominers
ODELL KOMINERS
Attorney for
Pacific Far East Line, Inc.

Of Counsel:

KOMINERS, FORT, SCHLEFER & BOYER
500 Tower Building
Washington, D.C. 20005

October 23, 1970

[Certificate of Service Omitted in Printing]

Petition of Seatrain Lines, Inc. for Reopening, dated November 6, 1970:

BEFORE THE
FEDERAL MARITIME COMMISSION

In re: APPROVAL OF AGREEMENT No. 9903 AND DENIAL OF REQUEST FOR HEARING AND INVESTIGATION	Docket No. 70-

PETITION OF SEATRAIN LINES, INC. FOR REOPENING

Pursuant to Rule 16 of the Federal Maritime Commission's ("Commission") Rules of Practice and Procedure Seatrain Lines, Inc. ("Seatrain") respectfully petitions the Commission to reopen this matter for reconsideration of its Order of October 28, 1970 approving Agreement No. 9903. That agreement would permit Pacific Far East Line, Inc. ("PFEL") to purchase the entire fleet and subsidized operations of Oceanic Steamship Company ("Oceanic"). The Commission's approval of the agreement despite the timely-filed protest of Seatrain was based on a finding "that Seatrain has no standing in this matter and that its protest is without substance" (Order, p. 3).

Seatrain requests that the Commission reconsider its findings for the following reasons:

I. The proponents of the Order have failed to meet their burden of proof.

II. Seatrain was denied its procedural right to reply to PFEL's motion.

III. Seatrain has standing to protect its domestic service from unfair competition resulting from this agreement.

IV. Seatrain, as a prospective competitor, has standing to protest the concentration of competition in the foreign trades.

V. Seatrain, as a potential purchaser of the two containerships now being built, has been foreclosed from the opportunity to own and operate those vessels without subsidy in the Pacific trades.

I. The proponents of the order have failed to meet their burden of proof.

Section 7(c) of the Administrative Procedure Act (5 U.S.C. § 556(d)) ("APA") implemented by Rule 10(o) of the Commission's Rules of Practice and Procedure places the overall burden of proof on the proponents of any agreement submitted for Commission approval. The Commission has noted that the "essential ingredient" for the accommodation of the Shipping Act with national antitrust policy is information or data in the hands of the parties to anticompetitive agreements:

> "[F]or presumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combination seeks to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act. . . ." *Mediterranean Pools Investigation*, 9 FMC 264, 290 (1966).

Agreement No. 9903 provides for the merger of two subsidized common carriers in the foreign commerce of the United States. As such it is clearly subject to section 15. *Agreement No. 9810—Stock Purchase Agreement Between Prudential Lines, Inc. and W. R. Grace & Co. and Sale and Transfer of Prudential Assets to Grace Line, Inc.*, 11 SRR 284 (1969); *Merger—AML, APL and PFEL*, 11 FMC 53, *supp'l. report*, 11 FMC 81 (1967), *aff'd. sub nom. Matson Navigation Co. v. FMC*, 405 F.2d 796 (9th Cir. 1968); *Agreement 8555—Isbrandtsen Steamship Co., Inc. and American Export Lines, Inc.*, 7 FMC 125 (1962).

The merger of common carriers is, on its face, a transaction that would violate section 7 of the Clayton Act (15 U.S.C. § 18) but for the immunity provided by Commission approval under section 15. This probable antitrust violation alone is sufficient to bring into play the requirement for the parties to demonstrate a serious transportation need for the merger:

> "By its very nature an illegal restraint of trade is in some ways 'contrary to the public interest' and the

Commission's antitrust standards, involving an assessment of the necessity for this restraint in terms of legitimate commercial objectives, simply gives understandable context to the broad statutory concept of the public interest.

• • •

"Congress has, it is true, decided to confer antitrust immunity unless the agreement is found to violate certain statutory standards, but as already indicated, antitrust concepts are intimately involved in the standards Congress chose. The Commission's approach does not make the promise of antitrust immunity meaningless because a restraint that would violate the antitrust laws will still be approved whenever a sufficient justification for it exists. Nor does the Commission's test, by requiring the conference to come forward with a justification for the restraint, improperly shift the burden of proof. The Commission must of course adduce substantial evidence to support a finding under one of the four standards of § 15, but once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest,' unless other evidence in the record fairly detracts from the weight of this factor. It is not unreasonable to require that a conference adopting a particular rule to govern its own affairs, for reasons best known to the conference itself, must come forward and explain to the Commission what those reasons are. We therefore hold that the antitrust test formulated by the Commission is an appropriate refinement of the statutory 'public interest' standard." *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 244 (1968).

Nowhere in the Commission's Order is there any indication that the parties to the merger have demonstrated even superficially that their inroad into the antitrust law is justified by some asserted transportation need. The Commission has chosen to ignore this standard and has apparently shifted the burden of proof to the protesting carrier,

Seatrain, to demonstrate in its initial pleading why the agreement should not be approved.[1]

Section 5(b) of the Administrative Procedure Act (5 U.S.C. § 554(b)) requires that every interested person be given timely notice of matters of fact and law asserted. We suggest that the evolution of a new legal standard and unprecedented allocation of the burden of proof constituted a change in the Commission's legal theory of procedure under section 15 and was improper notice to Seatrain prior to the issuance of the Commission's final Order of approval. Such action was therefore contrary to the APA. *Rodale Press, Inc.* v. FTC, 407 F.2d 1252 (D.C. Cir. 1968).

Furthermore, the *Federal Register* notice of October 14, 1970 provided only 10 days for protestants to accumulate any necessary documents and/or data to meet the burden which the Commission would now place on them. The Court of Appeals has noted that only preliminary views can be expected from protestants within that period of time:

> "'" Twelve days is skimpy, to say the least, if intended to include time required to sift through papers, consult clients, coordinate with other interested parties, research points of law, and put together documentary evidence. The Commission contends that time was of the essence. We do not think it necessarily impermissible to notice the matter for responsive filing in twelve days, in order to obtain *preliminary views*. If no protest is filed, or if no substantial issues are raised it may then be proper for the Commission to proceed and approve the agreements. Here the initial papers exposed issues of substance, issues of such obvious gravity that the Commission should not in any event need prompting from private parties before it holds a hearing." *Marine Space Enclosures v. FMC*, 420 F.2d 277, 587, n. 27 (D.C. Cir. 1969). (Emphasis added.)

Seatrain's protest was timely and raised substantial issues, namely:

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[1] We note also that this administrative shifting of the burden of proof was attempted in the Commission's Order to Show Cause of October 30, 1970 issued against the protesting carriers, Sea-Land Service, Inc. and Seatrain, in Docket No. 70-42: Agreement No. 9905 Between Moore-McCormack Lines, Inc. and American Export Isbrandtsen Lines, Inc.

(a) the prejudicial impact of the agreement on the domestic trades to Hawaii and Guam by promoting overtonnaging caused by CDS-built ships; and

(b) the anticompetitive consequences of the agreement in the Pacific trades by the foreclosure of potential competition and the erection of barriers to entry (Seatrain Protest, pp. 2-3).

As the court said in *Marine Space Enclosures, supra,* at 586:

"Certainly consideration of antitrust issues is required in this case, where they were timely raised by petitioner's protest, albeit in general terms.

Seatrain raised serious issues concerning the public interest as embodied in the antitrust laws. The Commission can set aside those laws only by finding that approval under section 15 is compelled by a serious transportation need. As the court made clear in *Marine Space Enclosures, supra,* at 587, n. 26:

"Here, however, we have under consideration an administrative action that is mandated for hearing by § 15 of the Shipping Act. The burden is not on the person who wants an unusual hearing (as in the case of rule-making, or waiver) but on the agency desiring the unusual dispensation from hearing."

The parties to the agreement were not required by the Commission to justify this merger agreement. Serious issues raised by the protestant were not investigated by the Commission prior to approval. No hearing was held. Seatrain was denied relief from the potentially detrimental effects of this agreement because within the allotted ten-day response period it failed to meet an arbitrarily placed burden of proof. All of these actions by the Commission were unlawful in light of the clear precedent of *Marine Space Enclosures.*

II. Seatrain was denied its procedural right to reply to PFEL's motion.

On October 23, 1970, PFEL filed a reply to Seatrain's Protest, Request for Hearing, and Petition to Intervene.

PFEL's reply consisted, *inter alia*, of a challenge to Seatrain's standing to be heard in this matter. Insofar as it raised the standing issue, the document constituted a motion for dismissal in the nature of an affirmative defense. As such, Seatrain should have been permitted the usual 15-day period within which to reply to the motion. This was obviated by the Commission's Order of October 30, 1970.

If the Commission is to deny the right of reply to motions such as this, every protestant and/or intervenor in the future will be required to anticipate motions challenging his interest and to carefully set out in detail the factual and legal basis for his standing to file with the Commission for relief. This would improperly place the burden of anticipating the defenses of the respondent carriers on those who seek to protect themselves from the harmful consequences of precipitant Commission action.

We do not believe that this is consistent with the spirit and intent of the APA which grants persons the right to proper notice of all matters of fact and law asserted (section 5(a) of the APA). The Commission's own Rule 5(e) states that new matters set forth in an answer by respondent will be deemed to be contraverted. Thus in complaint cases standing would be raised as a motion to dismiss and a reply would be permitted. Nor would an immediate decision before reply to a newly raised issue of standing be appropriate under the Federal Rules of Civil Procedure which either permit replies to all affirmative defenses raised (Rule 7a) or specify that such defenses are to be taken as denied or avoided and defer judgment on the issue (Rule 8d).

The Federal Register notice of October 14, 1970 did not require an affirmative statement of standing:

> "Any person desiring a hearing on the proposed agreement shall provide a clear and concise statement of the matters upon which they desire to adduce evidence. An allegation of discrimination or unfairness shall be accompanied by a statement describing the discrimination or unfairness with particularity. If a violation of the Act or detriment to the Commerce of the United States is alleged, the statement shall set forth with particularity the acts and circumstances said to con-

stitute such violation or detriment to commerce." 35 *Fed. Reg.* 16114.

Without warning, to require Seatrain to anticipate PFEL's motion to dismiss for lack of standing was an unreasonable determination by the Commission and an abuse of administrative discretion.

Seatrain has legal standing to protest Agreement No. 9903 before the Commission (see below). We were never given the opportunity to be heard, however, because the Commission decided the matter after an *ex parte* filing by PFEL. This arbitrary action by the Commission in violation of Seatrain's procedural rights should now be reversed through the process of reconsideration of the Commission's Order.

III. Seatrain has standing to protect its domestic service from unfair competition resulting from this agreement.

Seatrain operates containerships in the domestic trades between the Pacific Coast and Hawaii; between Hawaii and Guam, and between the Pacific Coast and Guam. PFEL operates two containerships acquired under the Vessel Exchange Act (section 510(i) of the Merchant Marine Act, 1936, as amended) between the Pacific Coast and Guam. These ships, GUAM BEAR and HAWAII BEAR, are restricted to use in that service. In addition, earlier this year PFEL operated two breakbulk ships, INDIA BEAR and CANADA BEAR, in a mid-Pacific service which called at Hawaii to pick up cargo for Wake Island, Kwajalein, and Guam before returning to the West Coast. (See testimony of Mr. Edwin A. Wester, PFEL Vice President, in Docket 69-56: Charter Agreement between Sea-Land and U.S. Lines, at pp. 4691 and 4714-15 of the transcript.) We now understand that these vessels have been transferred to operation in the West Coast/Far East trade (T.R. 29).

It is precisely this flexibility of operation which broadens the potential impact of any agreement between common carriers and which demonstrates Seatrain's legally protected interest. What would prevent the use of the newly acquired containerships (including two that have yet to be put in service) in the domestic trades? Or even more likely, what would prevent PFEL from releasing vessels

from current operation in the foreign trades to service in the domestic trades? There is little difference between increased competition in an overtonnaged trade caused directly by acquisition of ships for that trade or indirectly by acquisition of ships for a foreign trade which releases vessels for operation in the domestic trade. The impact on Seatrain would be just as severe either way. Yet the Commission neglected to acknowledge the potential impact of this merger on Seatrain in the domestic trades. Still worse, the Commission denied Seatrain the opportunity to elicit and present factual evidence of the extent and the unfairness of PFEL's acquisition.

Perhaps a restrictive condition on the use of the ships to be acquired from Oceanic and on any vessels already in PFEL's fleet would deter the detrimental impact of this agreement on the domestic trades. The Commission's Order made no mention of such a restriction and Seatrain was not given a chance to propose one.

Without restrictions on PFEL's operations, the acquisition of Oceanic's fleet represents a potential competitive threat to every other carrier in the Pacific trades, domestic or foreign. As the court stated in *Matson v. FMC, supra,* at 798:

> "The Commission found that Matson would suffer no injury as a result of the merger but would face greater competition. *This is sufficient to give standing.* . . . Further, if the Commission has power under § 15 to approve the agreement, the result would be to immunize the merger from the provisions of the antitrust laws, and Matson could never attack it in the future should injury later result." (Emphasis added.)

The permanence of this merger of Oceanic into PFEL is certain. The possibility of injury to Seatrain in the domestic trades to Guam and Hawaii is clear. The Commission erred in failing to find that Seatrain had standing to protect its existing domestic service.

IV. Seatrain, as a prospective competitor, has standing to protest the concentration of competition in the foreign trades.

Likewise, Seatrain has standing to protest Agreement No. 9903 on the basis of its effect in concentrating competi-

tion in the Pacific foreign trades, which market Seatrain is seriously considering for entry. Preservation of prospective competition is a worthy goal of regulatory agencies under settled legal precedent. *Stanwell Laboratories* v. *FAA*, 424 F.2d 859 (D.C. Cir. 1970); *Marine Space Enclosures v. FMC*, 420 F.2d 577 (D.C. Cir. 1969); and *Sea-Land v. Connor*, 418 F.2d 1142 (D.C. Cir. 1969).

In *Marine Space Enclosures, supra*, a non-terminal operator who was merely considering the building of a passenger terminal in New York was held entitled to an administrative hearing in which to protest an agreement which would foreclose the opportunity. In contrast, Seatrain is an established common carrier already serving some Pacific trades with the requisite experience and demonstrated know-how to expand into other Pacific trades. Hence, Seatrain's consideration of entry into the Pacific foreign trades is even more of a potentiality and represents more of a competitive interest than Marine Space Enclosure's desire to build a competitive terminal. This interest likewise deserves recognition thereby ensuring standing to protest anticompetitive effects.

As found by the Court of Appeals in *Marine Space Enclosures, supra*, at pp. 598-99:

> "The standing of a potential enterprise to object to agency action may be subject to skeptical inquiry when the action is of a type that increases competition. Petitioner's standing as a competitor, however, is established not only by its interest as a potential competitor, but by the nexus between that interest and the substantive objection that an order approving the agreements would not be in the public interest because of the way it operates to foreclose competition. *Even a potential competitor has standing to present non-frivolous claims of undue restraint on future competition.* . . . We must respect fully the standing requirements that insist on the kind of opposition of interests establishing a case or controversy. But we must be on guard lest the kind of deprecation of a competitor's standing, which evolved at common law in turning aside objections protesting against competition, should be applied mechanically and mistakenly in the direction of turning aside objections that are intended to preserve and enlarge competition. *Standing of poten-*

tial competitors is implicit. A major consideration of antitrust policy is preservation of potential market.

"This conclusion is fortified by the policy established by legislative enactment and extended by judicial doctrine, of vindicating antitrust legislation through private actions. In *Perma Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968), the Supreme Court overturned a decision that barred a private treble damage action based on the plaintiff's 'dirty hands,' saying that 'the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.' 392 U.S. at 139. See also *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969). Likewise, in administrative proceedings 'private citizens play a role in the effectuation of antitrust policy.' *City of Pittsburgh v. FPC*, 99 U.S. App. D.C. 113, 237 F.2d 741, 754 (1956). The pennant of 'private attorney general,' which may be hoisted by anyone with an economic stake who desires to signal issues of public interest, may be run to the very pinnacle of the mast in order to alert all concerned to storm signals of anti-competitive restraints." (Emphasis added.)

As Seatrain pointed out in its Protest, any potential competition between PFEL and Oceanic in the Pacific trades is foreclosed by this agreement. Furthermore, the concentration of competition in the Pacific trades and the attendant economics of administration, rationalization of sailings, and joint subsidies poses a formidable barrier to the entry of any carrier, especially an unsubsidized operator such as Seatrain. As the decided cases make clear and as sound public policy dictates, Seatrain has standing to protect a future service from possible irreparable injury resulting from this merger.

V. Seatrain, as a potential purchaser of the two containerships now being built, has been foreclosed from the opportunity to own and operate those vessels without subsidy in the pacific trades.

If given the opportunity, Seatrain would purchase the two new containerships now building and would use these

ships to enter the Far East service in competition with PFEL. Seatrain would operate the ships without operating-differential subsidy. The public would benefit (a) from increased competition in the Pacific foreign trade to the Far East, and (b) from a reduction in operating-differential subsidies.

The Commission is faced with two alternatives: (1) continued approval of Agreement No. 9903 resulting in subsidized operation of the new containerships, less competition in the foreign trades, and more competition in the already overtonnaged domestic trades; or (2) unsubsidized operation of the new containerships by Seatrain, another competitor in the Pacific trades, and no additional competition in the domestic trades. We think the more desirable alternative is obvious.

Conclusion

Seatrain urges the Commission to reconsider its Order of Approval of Agreement No. 9903. The Order was not based on substantial evidence of transportation need and was issued in clear contravention of Seatrain's rights. Furthermore, Agreement No. 9903 is unjustly discriminatory and unfair as between carriers, will operate to the detriment of the commerce of the United States, and will be contrary to the public interest. Therefore, it should not continue to be approved by the Commission under section 15 of the Shipping Act, 1916.

Respectfully submitted,

By Marvin J. Coles
Marvin J. Coles

By Paul M. Tschirhart
Paul M. Tschirhart

Coles & Goertner
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for:
Seatrain Lines, Inc.

November 6, 1970

[Certificate of Service Omitted in Printing]

Reply of Pacific Far East Line, Inc. to Petition for Reopening dated November 18, 1970:

BEFORE THE
FEDERAL MARITIME COMMISSION

IN THE MATTER OF CONTRACT OF SALE BETWEEN THE OCEANIC STEAMSHIP COMPANY AND PACIFIC FAR EAST LINE, INC.

(AGREEMENT No. 9903)

REPLY OF PACIFIC FAR EAST LINE, INC.

Pacific Far East Line, Inc. (PFEL) files this reply to Seatrain Lines, Inc.'s Petition for Reopening. Seatrain raises no new factual matter for Commission consideration.

Reopening is sought on a variety of legal grounds which amount to the proposition that the Commission did not give Seatrain sufficient notice or time in which to assemble a factual case that would reveal Seatrain's competitive interest in the PFEL/Oceanic agreement.[1] Thus, Seatrain claims the Commission's 10-day Federal Register notice was too hasty, that Seatrain was surprised the Commission would require some factual showing of a competitive interest, that this requirement was an unprecedented re-allocation of the burden of proof, and that Seatrain's competitive interest is revealed by the same old facts the Commission's Order found wanting. We shall respond to each of these arguments in turn.

I. Notice of the PFEL/Oceanic Agreement.

On October 14, 1970, this Commission noticed the PFEL/Oceanic agreement in the Federal Register advising interested persons to respond with their comments within 10 days.[2] This was not Seatrain's first awareness of the PFEL/Oceanic agreement either in fact or in contemplation of law. The essentials of the agreement had been reported in the public press two months earlier in the

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[1] We preserve our position that the PFEL/Oceanic agreement is not subject to Section 15, Shipping Act, 1916.

[2] The allotted time period was actually 18 days since the 10th day fell on Saturday, October 24th. FMC Rule 7(a), 46 C.F.R. 502.101.

August 14, 1970 issue of the C.I.B. Thereafter, on September 10th Seatrain wrote Maritime Administrator Gibson of its opposition to the PFEL/Oceanic agreement. Seatrain's September 10th letter clearly reveals that it was familiar with the essential terms of the PFEL/Oceanic agreement. Indeed, Seatrain concluded its letter to the Maritime Administrator by stating:

> Seatrain is presently considering whether the agreement between Oceanic and PFEL is subject to section 15 of the Shipping Act, 1916, 46 U.S.C.A. 814. In the event we determine that it is, we will file a request for a hearing with the Federal Maritime Commission. In such event, we will furnish a copy to the Maritime Subsidy Board for its information.

PFEL's ODS application relating to its use of the Oceanic vessels was published by the Maritime Administration in the September 16th Federal Register. Seatrain responded to that Federal Register notice on September 28th, and made yet another submission to Marad on October 12th in a companion proceeding just 2 days before the FMC noticed the pendency of the PFEL/Oceanic agreement. The law is abundantly clear that a person who has actual notice of an agreement required to be published in the Federal Register cannot claim to be adversely affected by an agency's failure to make formal Federal Register publication. 5 U.S.C. 552; *United States* v. *Aarons*, 310 F.2d 341 (2d Cir. 1962); *Kessler* v. *F.C.C.*, 326 F.2d 673, 690 (D.C. Cir. 1963). Not only did this Commission timely publish the PFEL/Oceanic agreement, but Seatrain knew of that agreement at least as early as September 10th, and no doubt earlier. Seatrain had ample opportunity to present this Commission a well-documented, thoughtful statement of its competitive interest in this proceeding. In any event Seatrain certainly now has had ample time to demonstrate a competitive interest, but has added nothing to its original protest.

II. Notice of Requirement That a Factual Showing of Competitive Interest be Demonstrated.

Seatrain also claims surprise that the Commission would not order the PFEL/Oceanic agreement to hearing absent a showing of Seatrain's competitive interest. This, it is

argued, unfairly burdened Seatrain with anticipating the defenses to its petition.

The argument is meritless. The Commission's Federal Register notice was directed to "[i]nterested parties" and informed them that:

> Any person desiring a hearing on the proposed agreement shall provide a clear and concise statement of the matters upon which they desire to adduce evidence. An allegation of discrimination or unfairness shall be accompanied by a statement describing the discrimination or unfairness with particularity. If a violation of the Act or detriment to the commerce of the United States is alleged, the statement shall set forth with particularity the acts and circumstances said to constitute such violation or detriment to commerce.

The Commission's notice by its terms required a particularized statement of the agreement's alleged infirmity. The Commission's rules by their terms require a proposed intervenor, such as Seatrain, to show "a substantial interest in the proceeding". FMC Rule 5(1). Those same rules require a petitioner, such as Seatrain, to "state clearly and concisely the petitioner's grounds or interest in the subject matter". FMC Rule 5(i). There is no substance then to Seatrain's claim of surprise. The Commission's Federal Register publication put Seatrain on notice; the Commission's rules put Seatrain on notice; and the case law put Seatrain on notice that the hearing process would not be activated unless it could demonstrate its competitive interest in the PFEL/Oceanic agreement. *Marine Space Enclosures, Inc.* v. *F.M.C.*, 420 F.2d 577, 591-92 (D.C. Cir. 1969). Again Seatrain's present petition filed after full awareness of the need to show some interest, shows none.

III. Allocation of the Burden of Proof.

Seatrain argues that the PFEL/Oceanic agreement is on its face a violation of Section 7, Clayton Act and must thereby be justified by a serious transportation need. While we have no quarrel with Seatrain's statement of the rule of law—that antitrust violations must be justified by transportation needs to receive Section 15 approval—the facts of this case simply do not fit Seatrain's argument.

Section 7, Clayton Act provides in relevant part (15 U.S.C. 18):

> No corporation engaged in commerce shall acquire . . . the whole or any part of the assets of another corporation engaged also in commerce, *where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.*

The face of the Clayton Act has a different aspect than Seatrain would lead one to believe. It does not preclude all acquisition,[3] but only those acquisitions which substantially lessen competition in a definable relevant market. See, *e.g.*, *Brown Shoe Co.* v. *United States*, 70 U.S. 294 (1962); *United States* v. *Aluminum Co. of America*, 377 U.S. 271 (1964).

The PFEL/Oceanic agreement cannot be twisted into that mold. PFEL operates a subsidized service on the California segment of Trade Route 29, and an unsubsidized service from the Pacific Coast to Guam and return. Oceanic, with only four vessels in its fleet[4] and two vessels scheduled for delivery in 1972, operates on Trade Route 27. The companies do not compete with one another. The PFEL/Oceanic agreement hardly can be shown to result in a substantial lessening of competition between non-competitors. No Clayton Act violation flows from the agreement, and neither PFEL nor Oceanic was obligated to demonstrate a serious transportation need requiring the agreement. Under these circumstances it is enough if approval of the agreement is consistent with the Commission's regulatory purposes. It is here, for although directed to by the Commission, Seatrain was unable to particularize any "discrimination", "unfairness", "violation of the Act" or "detriment to commerce" which would follow upon approval of the agreement.[5]

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[3] Seatrain mistakenly characterizes the PFEL/Oceanic agreement as a merger. It is not a merger but an acquisition of assets. PEEL has contracted to purchase Oceanic's vessels and certain related equipment.

[4] Two C3's to be retired upon delivery of the two containerships now under construction and two combination vessels.

[5] FMC Federal Register Notice, October 14, 1970.

IV. Seatrain has no Competitive Interest in the Agreement.

Seatrain once again presses on the Commission the same "facts" which the Commission held did not demonstrate a sufficient competitive interest in the agreement. Seatrain argues that its Guam service may somehow be adversely affected by the agreement although PFEL's ODS application to the Maritime Administration which Seatrain has read demonstrates that none of the Oceanic vessels will be placed in PFEL's Guam service.[6] Seatrain argues that its Pacific Coast/Hawaii cargo service may somehow be adversely affected by the agreement although again PFEL's ODS application demonstrates that no such service will be offered.[7] The supposed flexibility of PFEL's operations which Seatrain argues will somehow be detrimental simply is not true. Thus the INDIA BEAR and CHINA BEAR Seatrain instances[8] have been sold and PFEL's ODS agreement holds the company to serve particular routes. Seatrain serving Puerto Rico, Europe, Hawaii and Guam has far greater flexibility.

With respect to the foreign trades Seatrain's petition for reopening presents the Commission nothing new except an adverb. Its earlier filing stated that Seatrain "is considering entry" in the Pacific trades.[9] Its petition for reopening states that Seatrain "is seriously considering" entry in the Pacific trades.[10] This allegation remains "all gauze and no substance",[11] rhetoric and not fact. Seatrain's petition

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[6] See Maritime Administration Federal Register Notice, September 16, 1970.

[7] *Ibid.*

[8] Petition of Seatrain Lines, Inc., for Reopening, p. 10.

[9] Protest, Request for Hearing, and Petition to Intervene of Seatrain Lines, Inc., pp. 1-2.

[10] Petition of Seatrain Lines, Inc., for Reopening, p. 12.

[11] Marine Space Enclosures, Inc. v. FMC, *supra*, at 592. None of the cases Seatrain cites in its petition for reopening, p. 12, is authority for ordering a hearing upon such flimsy allegations of potential competition as Seatrain advances. In Seanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C.Cir. 1970), the actual second low bidder on a government contract was held to have a sufficient competitive interest in the letting of that contract to the non-responsive low bidder. In Sea-Land v. Connor, 413 F.2d 1142, 1145 (D.C. Cir. 1969), Sea-Land had actually instituted "certain pre-inaugural plans for a containership service over the same route" served by AHL. Additionally, by the time of court review Sea-Land's competitive service was in operation. In Marine Space Enclosures, Inc. v. FMC, *supra*, at 590, that

is devoid of any particulars regarding dates, vessels, scheduling, etc. It is nothing more than a bald statement of subjective intention. As the Commission properly observed, Seatrain has been unable to demonstrate "the likelihood of any impact at all upon its operations which might result from approval of the agreement".[12] Seatrain's final argument of its supposed interest is simply that it would like to purchase the two Oceanic containerships now under construction which are among the vessels included in the PFEL/Oceanic agreement. Under Seatrain's theory the Commission must be forced into granting a hearing if a company with no other interest in an agreement claims that there is some portion of the agreement which it would prefer to have for itself. This is patently frivolous, would hamstring the Commission's functions, and lead to long and costly hearings for no other reason than that one company wishes to try to upset an agreement two other companies have reached.

Conclusion

For the foregoing reasons the Commission should deny Seatrain's petition for reopening and adhere to its original order approving Agreement No. 9903.

Respectfully submitted,

/s/ Odell Kominers
Odell Kominers
Stephen F. Eilperin
Attorneys for
Pacific Far East Line, Inc.

Kominers, Fort, Schlefer & Boyer
500 Tower Building
1401 K Street, N. W.
Washington, D. C. 20005

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company had already drawn up plans for a terminal complex which had won the enthusiastic support of New York planning officials. Beyond that the 70 year restraint on all other terminal operators was a patent and massive invasion of the antitrust laws and dissatisfaction with the agreement had been voiced by six different steamship companies whose business the terminal was supposed to service.

[12] FMC Order—Approval of Agreement No. 9903 and Denial of Request for Hearing and Investigation.

CERTIFICATION OF SERVICE

I hereby certify that I have this date mailed by first class mail, postage prepaid, a copy of the foregoing reply to:

Marvin J. Coles, Esquire
Coles & Goertner
1000 Connecticut Avenue, N. W.
Washington, D. C. 20036

/s/ Stephen F. Eilperin
STEPHEN F. EILPERIN

November 18, 1970

Letter to Francis C. Hurney, Secretary, FMC, from J. R. Kuykendall, Director, Government Relations, Oceanic Steamship Company, adopting Pacific Far East Line, Inc. Reply to Petition to Reopen, dated November 20, 1970:

MATSON LINES
THE OCEANIC STEAMSHIP COMPANY
1001 CONNECTICUT AVE., N. W.,
WASHINGTON, DC 20036 • 628-5775

November 20, 1970

Mr. Francis C. Hurney, Secretary
Federal Maritime Commission
1405 Eye Street, N. W.
Washington, D. C. 20573

Dear Secretary Hurney:

In connection with the petition of Seatrain Lines, Inc. for reopening of the Commission's order approving Agreement No. 9903, the Oceanic Steamship Company and Matson Navigation Company, parent company of Oceanic and guarantor of Oceanic's obligations under the subject agreement, hereby adopts as its own Pacific Far East Line, Inc.'s November 18 reply to said petition.

In respect to Seatrain's self-characterization as a potential purchaser of Oceanic's container ships, this is to advise that Oceanic has no plans to sell its container ships under construction to Seatrain in the event of disapproval of Agreement No. 9903.

Yours very truly,

/s/ J. R. Kuykendall
J. R. KUYKENDALL
Director, Government Relations

cc: Marvin J. Coles, Jr.

Motion for Leave to Lodge Material and to Refer Thereto on Oral Argument, United States, dated November 24, 1971:

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEATRAIN LINES, INC.,
PETITIONER,
v.
FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
RESPONDENTS
and
PACIFIC FAR EAST LINE, INC. and THE OCEANIC STEAMSHIP COMPANY,
INTERVENORS.

No. 71-1093

MOTION FOR LEAVE TO LODGE MATERIAL AND TO REFER THERETO ON ORAL ARGUMENT

Respondent, United States of America, respectfully moves for leave to lodge the attached material and to make reference thereto during oral argument scheduled for December 10, 1971.

The attached material is taken from two nationally recognized financial publications—Moody's Transportation Manual, 1970, and The Fortune Directory (May 1970) of the 500 Largest U.S. Industrial Corporations etc. The material shows that intervenor, Pacific Far East Line, the acquiring firm in this litigation, is controlled by Consolidated Freightways, Inc., which had operating revenues for 1969 in excess of $450 million and ranked 19th in operating revenues among the nation's largest transportation companies.

This material is sought to be lodged to illustrate the kind of material which the respondent Federal Maritime Com-

mission could have taken into account, had the Commission held a hearing rather than summarily approved Agreement No. 9903.

Respectfully submitted,

IRWIN A. SEIBEL,
HARRY FIRST,
Attorneys for Respondent
United States of America

Washington, D. C.
November 24, 1971

[Certificate of Service Omitted in Printing]

Response in Opposition to Motion of United States, Federal Maritime Commission, dated December 1, 1971:

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEATRAIN LINES, INC.,
PETITIONER,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
RESPONDENTS

and

PACIFIC FAR EAST LINE, INC. and THE OCEANIC STEAMSHIP COMPANY,
INTERVENORS.

No. 71-1093

RESPONSE IN OPPOSITION TO MOTION OF UNITED STATES OF AMERICA FOR LEAVE TO LODGE MATERIAL AND TO REFER THERETO ON ORAL ARGUMENT

The Federal Maritime Commission respectfully moves this Court, pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure and Rule 6(b) of the General Rules of this Court, to disallow the motion of the United States of America for leave to lodge certain material with the Court and to refer thereto on oral argument. The basis of the Commission's opposition is that such material is over a year old and was available at the time that the briefs were filed herein, raises questions of the implications to be drawn from certain facts, which are in the first instance to be resolved by the regulatory agency rather than the courts and were so resolved in this proceeding, and in general may tend to distort the issues in this proceeding.

I. No Reason Appears for Admitting the Material at this Time.

The material which the United States desires to lodge with the Court consists of entries in certain financial publications: *Moody's Transportation Manual, 1970,* and *The*

Fortune Directory (May 1970). Such material was, of course, available well in advance of the filing of the brief of the United States here on July 19, 1971. In fact, as will appear from the motion of the United States for extension of time in which to file its brief, Respondent, Federal Maritime Commission, did not oppose an extension for such purpose of 16 days, to and including July 17, 1971, in effect July 19, 1971, July 17 falling on a Saturday.

II. The Significance of the Matter which the United States Desires to Lodge with this Court is a Question for Resolution by the Commission.

The material which the United States desires to lodge with this Court raises questions with respect to the significance of the relationship between Pacific Far East Line, Intervenor herein, and Consolidated Freightways, Inc. Such questions are, of course, to be resolved in the first instance by the Federal agency recognized by the Congress as possessing the requisite expertness in such matters. See e.g., *Marine Terminal* v. *Rederi Transatlantic*, 400 U.S. 62, 68-69 (1970); *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952).

III. The Material which the United States Seeks to Lodge with the Court was Available to and Known by the Commission when the Decision Here Under Review was Rendered.

As outlined in II above, the significance of the proffered material is something which should in the first instance be considered by the Commission. To the extent, however, that such is of significance, it was known by and considered by the Commission in the subject proceeding here under review. The publications are matters of general information continuously available in the library of the Commission and regularly consulted by the Commission and its staff. The acquisition of Pacific Far East Line by Consolidated Freightways, Inc. was furthermore generally known throughout the maritime trade, and was specifically approved by the Maritime Administration in connection with the subsidized operations of Pacific Far East Line. Finally, and most importantly, as will appear from the appended correspondence and memorandum contained in the Com-

mission's files, the Commission specifically examined the relationship between Pacific Far East Line and Consolidated Freightways.* To allow specific receipt of the requested material will only isolate one fact known to and considered by the Commission in the proceeding below, a fact which the Commission is well acquainted with, and to which no reason appears to call the Court's special attention at this time.

For the foregoing reasons, it is respectfully requested that the motion of the United States for leave to lodge material and to refer thereto on oral argument be denied.

Respectfully submitted,

JAMES L. PIMPER
General Counsel

EDWARD G. GRUIS
Deputy General Counsel

GORDON M. SHAW
Attorney

FEDERAL MARITIME COMMISSION

Washington, D. C.
December 1, 1971

[Certificate of Service Omitted in Printing]

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* Appendices "A" and "B" represent an exchange of correspondence with respect to the acquisition of Pacific Far East Line by Consolidated Freightways between the Chief of the Commission's Office of Carrier Agreements and the President of PFEL. Appendix "C" is a memorandum dated June 27, 1969, which summarizes the investigation made by the Commission's staff with respect to the acquisition.

APPENDIX

FEDERAL MARITIME COMMISSION
WASHINGTON, D.C. 20573
May 19, 1969

Mr. Leo C. Ross
President
Pacific Far East Line, Inc.
141 Battery Street
San Francisco, California 94111

Dear Mr. Ross:

There have been a number of recent reports that Consolidated Freightways is to acquire a majority interest in Pacific Far East Line. So as to enable the Commission to determine whether the Consolidated arrangement falls within the purview of section 15 of the Shipping Act, 1916, we request that you provide us with information regarding any pending proposal for acquisition. We are particularly interested in ascertaining whether any of Consolidated Freightways' operations would make them either a common carrier or another person within the definition of those terms in the Shipping Act.

Any information that you can give us regarding this matter will be appreciated.

Sincerely yours,

/s/ William Levenstein
WILLIAM LEVENSTEIN, *Chief*
Office of Carrier Agreements
(Foreign Commerce)
Bureau of Compliance

PACIFIC FAR EAST LINE, INC.
141 BATTERY STREET
SAN FRANCISCO 94111

June 9, 1969

Mr. William Levenstein, Chief
Office of Carrier Agreements
Bureau of Compliance
Federal Maritime Commission
Washington, D.C. 20573

Dear Mr. Levenstein:

Reference is to your letter of May 19th regarding reports you had received concerning the possible acquisition of a majority interest in Pacific Far East Line, Inc. by Consolidated Freightways, Inc. Your particular interest seems to be whether Section 15 of the Shipping Act of 1916 would in any way be applicable.

The actual consummation of the sale of approximately 51% of PFEL by Natomas and Mr. Ralph K. Davies and associates to Consolidated Freightways, Inc. was May 8, 1969, subject then only to the approval of the Maritime Administration. The Maritime Administration granted its approval on May 29.

The operations of Consolidated Freightways, Inc. in no way qualify them as a common carrier or another person within the definition of those terms as defined in the Shipping Act of 1916. We further state that PFEL has entered into no agreement, written or oral, that comes within the purview of Section 15 of that Act.

Sincerely yours,

/s/ Leo C. Ross
Leo C. Ross

Reply to Response in Opposition to Motion of United States, United States, dated December 3, 1971:

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEATRAIN LINES, INC., PETITIONER, v. FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS and PACIFIC FAR EAST LINE, INC. and THE OCEANIC STEAMSHIP COMPANY, INTERVENORS.	No. 71-1093

REPLY TO RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO LODGE MATERIAL AND TO REFER THERETO IN ORAL ARGUMENT

This reply by Respondent, United States of America, is filed pursuant to Rule 6(c) of the General Rules of this Court.

We agree with Counsel for the Federal Maritime Commission that the significance of the matter we wish to lodge with the Court is a question for resolution in the first instance by the Commission. That was the point of our Motion to Lodge: that the significance of the relationship between the control by Consolidated Freightways of PFEL, on the one hand, and the acquisition by PFEL of the Oceanic assets, on the other, should have been evaluated by the Commission. Whether or not the significance was known and considered by the Commission is another matter. The fact that Moody and Fortune publications are available in the Commission's library does not show that the information was known to the Commission. Nor is it shown by the fact that in 1969 the Commission's staff wrote an internal memorandum, and corresponded with PFEL, concerning Consolidated Freightway's control. In any case, whether or not the information was known to the Commission is not as important as whether the Commission evaluated the

significance of this information in relation to the acquisition under consideration. There is nothing in either of the Commission's orders (App. 97, 138) which indicates that it did so. That is why, among other reasons, we suggest that the Commission's peremptory approval of Agreement No. 9903 reflects a failure to evaluate sufficiently the impact of the Agreement.

The motion to lodge and to refer to the material attached thereto should be granted.

Respectfully submitted,

IRWIN A. SEIBEL,
HARRY FIRST,
Attorneys for Respondent
United States of America

Washington, D. C.

December 3, 1971

Order of the Court of Appeals for the District of Columbia Circuit granting Motion of United States, dated December 8, 1971:

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1971

No. 71-1093

SEATRAIN LINES, INC.
PETITIONER

v.

FEDERAL MARITIME COMMISSION
and UNITED STATES OF AMERICA
RESPONDENTS

PACIFIC FAR EAST LINE, INC.
INTERVENOR

Before: BAZELON, *Chief Judge*

[United States Court of Appeals for the District of Columbia Circuit, Filed Dec. 8, 1971, Nathan J. Paulson, *Clerk*]

ORDER

On consideration of the motion of respondent United States of America for leave to lodge material and refer thereto on oral argument, and of the responsive pleadings filed with respect thereto, it is

ORDERED that the aforesaid motion is granted and the material attached thereto shall be lodged with the Clerk.

Judgment of the Court of Appeals for the District of Columbia Circuit, dated March 23, 1972:

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1971.

No. 71-1093

SEATRAIN LINES, INC.
PETITIONER

v.

FEDERAL MARITIME COMMISSION
and UNITED STATES OF AMERICA
RESPONDENTS

PACIFIC FAR EAST LINES, INC.
INTERVENOR

Petition for Review of Orders of the Federal Maritime Commission

Before: BAZELON, *Chief Judge*, and MACKINNON and WILKEY, *Circuit Judges*.

[United States Court of Appeals for the District of Columbia Circuit, Filed Mar. 23, 1972, Nathan J. Paulson, *Clerk*]

JUDGMENT

This cause came on to be heard on the record from the Federal Maritime Commission, and was argued by counsel. Supplemental memoranda were thereafter filed by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the order of the Federal Maritime Commission approving Agreement No. 9903 and the order denying a petition to reopen are hereby

vacated, and the Commission is hereby directed to remove the agreement from its docket.

Per Curiam
For the Court:

/s/ Nathan J. Paulson
NATHAN J. PAULSON
Clerk

A true copy:

Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.

By: Dorothy E. Long, *Deputy Clerk*

Dated: March 23, 1972.

Opinion by Circuit Judge Wilkey.

☆ U.S. Government Printing Office: 1972—492-010/406